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Supreme Court, U.S.
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No. 01-1129

In the

Supreme Court of the United States

MICHAEL PITTS and CHARLES LAWSON,

Petitioners,

v.

CITY OF KANKAKEE, an Illinois Municipal Corporation, DONALD E. GREEN, Individually and as Agent of the City of Kankakee, and CHRISTOPHER BOHLEN, Individually and as Agent of the City of Kankakee,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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REPLY

The Respondents' Brief failed to address any of the four questions presented in the Petition for Writ of Certiorari.

The common theme encompassed in all four of Petitioners' questions involved what standards should be applied to Complaints alleging a continuing violation of Plaintiffs' 1st Amendment rights as to when the statute of limitations began and expired.

The Respondents' failure to rebut Petitioners' arguments that other Circuits would not have found Petitioners' Complaint time barred consistent with their decisions in 42 U.S.C. §1983 continuing violation cases and Respondents' failure to address the issue that other Circuits use different criteria for determining when the statute of limitations begins and ends in employment discrimination cases alleging a continuing violation is the most compelling reason the Court should grant the Petition.

The Respondents cite *Jaffee, Special Administrator v. Redmond*, 518 U.S. 1 (1996). This was a wrongful death case—not a continuing violation case and has no relevance to any of the issues framed within the Petition for Writ of Certiorari.

The Respondents also cite *Morange v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). This is a wrongful death case involving maritime law and has nothing to do with a continuing violation either in a 1st Amendment or employment discrimination context and is totally irrelevant to any issue before the Court.

With the exception of *Pitts v. City of Kankakee*, 267 F.3d 592 (7th Cir. 2001); and *Ferner v. Village of Sheffield*, 656 F.Supp. 1017 (N.D. Ohio 1987), Respondents cite the Court nothing but employment discrimination

cases. Respondents made no argument to this Court that the statute of limitations criteria in an employment discrimination continuing violation case should be identical to those brought under 42 U.S.C. §1983. The reason is obvious. The cases from other Circuits in the 42 U.S.C. §1983 cases cited in the Petition for Writ of Certiorari hold to the contrary.

Respondents' use of *Ferner v. Sheffield*, supra; is disingenuous when read in light of their *Memorandum in Support of Their Motion to Dismiss Plaintiffs' Amended Complaint* in the U.S. District Court case. (Appendix 1-8; at p. 6).

Respondents' Memorandum admitted that if *Ferner*, supra; was the law in the 7th Circuit, Plaintiffs' Amended Complaint, alleging a continuing violation of their 1st Amendment rights would not be time barred.

Respondents' use of *Gonzales v. North Township of Lake County*, 800 F.Supp. 676 (N.D. Ind. 1992); "*Gonzales I*" and *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993); "*Gonzales II*" is also incorrect.

In *Gonzales I*, supra; the District Court held only one Plaintiff had standing to challenge a religious sign posted and maintained continuously for more than twenty-seven (27) years prior to the filing of his Complaint even though Plaintiff knew of the sign's existence more than two years before he filed suit.

In *Gonzales I*, supra; decision the Defendant's statute of limitations argument seeking to bar Plaintiff's claim failed because as the U.S. District Court said:

> "The day a cause of action accrues is a Federal question even though a State statute of limitations is utilized . . . Appleman alleges a continu-

> ing violation of the 1st Amendment as each day there is a violation, each day's cause of action accrues. . .", at p. 684.

However, the U.S. District Court held the religious sign was secular and did not violate Appleman's 1st Amendment rights. All the Plaintiffs in *Gonzales I* appealed; Appleman as to the District Court's ruling the sign was secular and the remaining Plaintiffs as to the District Court's ruling denying them standing.

The 7th Circuit Court of Appeals reversed the District Court decision, holding that all the Plaintiffs had standing; and the sign did violate the 1st Amendment rights of each of the Plaintiffs. The issue of standing which carries with it the requirement the Plaintiff suffers an actionable injury is at the core of Respondents' misuse of the *Gonzalez* cases.

The 7th Circuit's decision in *Gonzales II* held each Plaintiff alleged a continuing violation injury resulting from the religious sign, and because the religious sign was still up, even though some of the Plaintiffs knew of the existence of the religious sign more than two years before they filed their Complaint, the continuous posting of the religious sign was a continuing violation of Plaintiffs' 1st Amendment rights and therefore, not barred by the statute of limitations.

The religious sign was put up only one time some twenty-seven (27) years before the Plaintiffs in the *Gonzalez* cases filed suit. Similarly, the "slum signs" complained of by Petitioners were put up only one time. The 7th Circuit's decision reversing and granting each and every one of the Plaintiffs all of their relief in *Gonzalez II* leads to the conclusion that each day the "slum signs" remained publicly posted in retaliation for Petitioners' exercise of

their Constitutional rights, a new violation of their 1st Amendment rights was inflicted on them and the statute of limitations did not begin to run while the violation of either Petitioner's rights or Plaintiffs' rights in the *Gonzalez* cases continued to be inflicted on them.

The 7th Circuit's opinion in *Gonzalez II*, built upon the religious sign's continuous placement giving specific individuals standing to sue for a violation of their 1st Amendment rights as a continuous violation is legally indistinguishable from Petitioners' injuries.

It is true Petitioners' claims involved an unconstitutional retaliation directed only at them. It is also true the religious sign was not intended to unconstitutionally injure any identifiable individual. However, that is irrelevant because standing carries with it the necessary prerequisite that an individual suffer an actionable injury as a result of State action, which includes situations where the injury results from a failure to act.

The fact other persons may not have felt injured and chose not to legally complain about the unconstitutional religious sign is irrelevant. The Plaintiffs in *Gonzalez II* had the requisite standing because each of them suffered an actionable harm. Their harm gave each of them standing to sue based on a continuing violation of each of their 1st Amendment rights. There is no difference with the standing and injury of the Plaintiffs in *Gonzalez II* and the standing and injury of the Petitioners in this case, and Respondents cite the Court no authority to the contrary.

The fresh acts of retaliation by the Respondents against the Petitioners resulted in a further Constitutional injury by their failure to act. Petitioners' authority on this issue was met with silence in Respondents' Brief.

Respondents' misuse of *Ferner*, supra; and their superficial assertions regarding the persisting effect of past discrimination may be the law in determining when the statute of limitations runs in employment discrimination cases, but it is not dispositive in 1st Amendment continuing violation cases.

Respondents did not address the law cited within Petitioners' Petition for Writ of Certiorari establishing with legal authority that there is a different standard when continuing violation involving 1st Amendment rights is time barred.

As *Ferner*, supra; held, when a person alleges a continuing violation of his 1st Amendment rights, the issue is not when the Plaintiff should have known that he or she was being retaliated against but, as in *Ferner*, supra; if a fresh act of retaliation occurred within the statute of limitations the Plaintiff's damages for time barred acts are recoverable if an act, which includes a "failure to act" occurs within the statute of limitations, *Ferner v. Sheffield*, supra.

Petitioners' reliance on "fresh acts" is in the alternative to their reliance on the continuous posting of the sign as a continuing violation of their 1st Amendment rights. Respondents did not address either one of these issues in the context of Questions posed within Petitioners' Writ.

The Respondents' Brief in Opposition is a series of admissions through their failure to cite the case law on the questions and issues presented. The Respondents' misuse of the *Gonzalez* cases and their concluding incomprehensible statement that: "A failure to act cannot be an act", stands unsupported by any authority.

Petitioners' cases established the conflict among Circuits. Respondents presented no coherent argument sup-

ported by authority and their final sentence falls freely, unsupported by any precedential parachute.

CONCLUSION

For the foregoing reasons Petitioners submit that the Court, having ordered Respondents to provide it with competent authority and Respondents having failed to do so in support of their position, Petitioners submit that their Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA/DANVILLE DIVISION

MICHAEL PITTS, and CHARLES LAWSON,	)	
Plaintiffs,	)	
vs.	)	No. 99-2281
	)	**JURY TRIAL DEMANDED**
CITY OF KANKAKEE, ILLINOIS, an Illinois Municipal Corporation; DONALD E. GREEN, Individually and as AGENT OF THE CITY OF KANKAKEE; and CHRISTOPHER BOHLEN, Individually and as AGENT OF THE CITY OF KANKAKEE,	)	
Defendants.	)	

MEMORANDUM OF DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

The Defendants have moved to dismiss the Amended Complaint on the basis that the Plaintiffs' claims of retaliation accrued in June, 1997, when their property was "posted" by the Defendants, and the refusal of the Defendants to remove the signs does not amount to a continuing violation. This claim was filed more than two years after the claims accrued and is barred by the applicable limitations period.

ALLEGATIONS OF AMENDED COMPLAINT

The Plaintiffs are officers of the Kankakee Landlords Association (Amended Complaint, Count I, ¶10; Count II, ¶45), and from 1994 to the present, publicly criticized the Defendants' enforcement and application of the CITY OF KANKAKEE's licensing ordinance and the enforcement by the Defendants of the CITY's sign ordinance. (Count I, ¶23; Count II, ¶58). The Plaintiffs also supported Defendant GREEN's opponent in the mayoral elections in Spring, 1993 and Spring, 1997. (¶¶11, 16). In retaliation for the Plaintiffs engaging in their rights of free speech and free association, the Defendants are alleged to have retaliated against the Plaintiffs by "posting" certain property owned by the Plaintiffs and another parcel of property identified as being owned by Plaintiff PITTS as "slum property".

As to PITTS (Count I), in June, 1997, signs were placed on property at 319 Albert and 921 East Merchant, labeling the property as "slum property". Count I, ¶¶28-29). Although PITTS was identified as the owner and the telephone number of his business was listed on the sign, it is alleged that PITTS never owned this property. (Count I, ¶30). PITTS, inexplicably, repaired one of the properties for the owner (Count I, ¶33); and despite being ordered by the CITY Council, in August, 1999, to remove the sign at the 319 address, the Defendants refused to comply with that vote. (Count I, ¶¶36-37). It is also alleged that in August, 1999, PITTS was told that the sign at 319 would never by removed. (Count I, ¶35).

As to Plaintiff LAWSON (Count II), his property at 442 Chicago was posted in June, 1997 (Count II, ¶62); and despite the property being sold in October, 1999 to a non-profit organization that has CITY officials as employees or officers, the Defendants allowed the sign to continue

to remain on the property and never posted a sign identifying the new owners of the property. (Count II, ¶¶67-68).

ARGUMENT

The applicable statute of limitations for Section 1983 actions arising in Illinois is two years. *Johnson v. Supreme Court of Illinois*, 165 F.3d 1140, 1141 (7th Cir. 1999). This action was filed on November 18, 1999, and the acts of posting the property in June, 1997, clearly are barred by the applicable limitations period. The Plaintiffs, however, seek to avoid the two-year prescription by opining that the actions of the defendants are continuing violations, up to April 7, 2000 (Count I, ¶39), or the date of filing (Count II, ¶72) of the Plaintiffs' First Amendment rights. (Count I, ¶39; Count II, ¶48). The continuing violation doctrine has no application.

"The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an *act* that is within the limitations period. For purposes of the limitations period, courts treat such a combination as one continuous act that ends within the limitations period." *Garrison v. Burke*, 165 F.3d 565, 569 (7th Cir. 1999) (emphasis added). And when there has been a "two-year lull", the application of the continuing violation doctrine is precluded. (*Id.*, 165 F.3d at 570).

In this Circuit, the continuing violation doctrine has been applied only in three different circumstances:

> First, in the context of hiring and promotion decisions where the decision-making process takes place over a period of time and the limitations begins running when the employee knows that the decision has been made;

> Second, when there exists an express, openly espoused policy that is alleged to be discriminatory; and
>
> Third, where a covert practice of discrimination is followed over a period of time in such circumstances that a plaintiff can only realize that he is a victim of discrimination after a series of discreet acts and the period begins to run when the plaintiff gains such insight.

Jones v. Merchants Nat. Bk. & Trust Co., 42 F.3d 1054, 1058 (7th Cir. 1994).

Where a plaintiff knows, or with the exercise of reasonable diligence should know that a claim exists, the plaintiff must sue over that act within the period of limitations. (*Id*).

The first two exceptions clearly do not apply in the case at bar. And with respect to the third exception, a plaintiff may not base a suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, for example, if it could not be recognized as actionable only in light of later events. *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996).

The Plaintiffs clearly were on notice of the Defendants' actions in June, 1997 and should have sued then. It is fundamental that in order for the continuing violation theory to apply, there must be an "anchoring" act that occurs within the limitations period. *Speer v. Rand McNally & Co.*, 123 F.3d 658, 664 (7th Cir. 1997); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1528 (7th Cir. 1990). A refusal to undo a prior wrongful act is not a frest act of illegality. *Speer*, 123 F.3d at 664; *Graehling v.*

Village of Lomard, 58 F.3d 295, 297 (7th Cir. 1995). The failure to correct a violation of federal law is not, in itself, a violation of that law. *Librizzi v. Children's Memorial Medial Center*, 134 F.3d 1302, 1306 (7th Cir. 1998).

The following are examples of claims in which the Court has held that the continuing violation doctrine had no application, and that the damages were simply the "lingering" effect of an unlawful act. Pay differential which results from a non-promotion claim is not a continuing violation. *Dasqupta v. University of Wisc. Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997). Nor is being assigned low rungs on the seniority ladder which results in a later denial of promotion. *Huels v. Exxon Coal USA, Inc.*, 121 F.3d 1047 (7th Cir. 1997).

As noted above, no illegal act occurred within the limitations period, other than the failure of the Defendants to remedy the alleged retaliatory act of placing the sign in the first place. It is the burden of the Plaintiffs to present facts which would justify some equitable modification of the limitations period. *Hamilton v. Komatsu Dresser Ind., Inc.*, 964 F.3d 600 (7th Cir. 1992).

The Plaintiffs may claim that they fall within the second circumstance in which the continuing doctrine violation has been applied, that is, when there is a challenge to an express and openly espoused policy. But simply characterizing the allegations of the Complaint as such, does not make it so.

In *Selan v. Kiley*, 969 F.2d 560, 565 (7th Cir. 1990), the Seventh Circuit gave examples of this second exception—an "express, openly espoused policy of discrimination against older workers" (969 F.2d at 565) or "systemic" challenges to an entire promotional system or retirement policy. (969 F.2d at 565 n. 5). To fall within

this exception, there must be "an explicit, clearly conveyed policy", for example, of discriminating against blacks in promotion decisions. *Jones v. Merchants Nat. & Trust Co.*, 42 F.3d 1054, 1058 (7th Cir. 1994). No such policy is involved in this case.

"The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period". *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992). Therefore, the critical inquiry is to determine whether there has been a "fresh act" of illegality. None of the cases previously relied upon by the Plaintiffs in responding to the prior Motion to Dismiss support their theory that the failure or refusal of the Defendants to remove the sign constituted a "fresh act".

In *Ferner v. Village of Shefield*, 656 F.Supp. 1017 (N.D. Ohio, 1987), the Court noted that there was a continuing violation because the plaintiff's hours were "drastically reduced since he exercised his free speech rights". The damage occurred each payroll period. And to the extent that this may support the position of the Plaintiffs, it is not law in this Circuit. The discriminatory application of pay schedules are not viewed as the lingering effect of a prior, unlawful act. *Dasqupta v. University of Wisconsin Board of Regents*, 121 F.3d 1138 (7th Cir. 1997) (Title VII and Section 1983 case).

Togba v. Cook County, 1999 LEXIS 18506 (N.D. Ill., 1999) is distinguishable since there the Court found that in view of "repeated assurances" that the plaintiff would receive a raise, the plaintiff did not recognize the existence of his claim. Similarly, in *Båker v. F & F Inv. Co.*, 489 F.2d 829 (7th Cir. 1993), the Court held that each installment payment under a contract was a separate and

distinct violation, where a racially discriminatory mortgage and finance program was at issue. *Hanover Shoe, Inc. v. United States Mach.*, 392 U.S. 481 (1968) also involved a lease. And *in Lickteig v. Landauer*, 1991 LEXIS 18307 (E.D. Pa., 1991), the Court commented that some illegal acts had occurred within the limitations period.

The "acts of retaliation" upon which the Plaintiffs rely all involve the failure or refusal of the Defendants to take down the signs. (Pl. Brf., p. 11). That the Defendants did not put up a sign at 422 after the Plaintiffs sold the property to neighborhood partners is again simply an allegation that the Defendants failed to ameliorate a prior, alleged unlawful act.

Respectfully submitted by,

/s/ William W. Kurnik

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record herein, hereby certifies that the original of the foregoing **REPLY MEMORANDUM OF DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT** was filed with the Clerk of the U.S. District Court for the Central District of Illinois; and a copy thereof was served upon the following, by depositing same in the U.S. mail, first-class postage prepaid this 10th day of May, 2000;

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